DEC 7 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 643

BERT O. PETERSON, MIDWEST HOLDING COMPANY, A CORPORATION,

Petitioners,

vs.

HAROLD L. ICKES, INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR; OSCAR L. CHAPMAN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF THE INTERIOR; FRED W. JOHNSON, INDIVIDUALLY AND AS COMMISSIONER OF THE GENERAL LAND OFFICE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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INDEX

	Page
The proceeding below	2
Jurisdiction	2
Questions presented	3
Statute involved	3
Statement of facts	4
Specification of errors to be urged	7
Reasons for granting the writ	8
Conclusion	14

CITATIONS

Cases:

Baltimore & Ohio Rd. Co. v. *Walker*, 45 Ohio St. 577, 16 N. E. 475	11
Benjamin v. *Wilson*, 34 Minn. 517, 26 N. W. 725	11
Board of Commissioners v. *Northwestern Mutual Life Insurance Co.*, 114 Neb. 596, 209 N. W. 256	11
Brigham City v. *Chase*, 30 Utah 410, 85 Pac. 436	11
Callender v. *Crossfield Oil Syndicate*, 84 Mont. 263, 275 Pac. 273	10
Dugan v. *Cedar County*, 87 Neb. 689, 128 N. W. 29	11
Graf v. *State*, 118 Neb. 485, 225 N. W. 466	11
Herigstadt v. *Hardrock Oil Co.*, 101 Mont. 22, 52 P. (2d) 171	9
Judd v. *Landin*, 211 Minn. 465, 1 N. W. (2d) 861	11
Lozo v. *Sutherland*, 38 Mich 168	11
Nalle v. *Eaves*, 5 S. W. (2d) 500	10
National Bond, etc., Co. v. *Anderson*, 99 Minn. 137, 108 N. W. 861	11
Robinson v. *Jones*, 119 Kan. 609, 240 Pac. 957	9
Sorg v. *Crandall*, 223 Ill. 79, 84 N. E. 181	10
State v. *Wheeler*, 23 Nev. 143, 44 Pac. 430	11
Texas, etc., Company v. *Smith*, 108 Tex. 265, 192 S. W. 533	11

Page

Webber, etc., Co. v. *Erickson,* 216 Mass. 81, 102 N. E. 940 10
Woodstock, etc., Co. v. *Charleston, etc., Co.,* 84 S. C. 306, 66 S. E. 194 11

Statutes:

Mineral Leasing Act of February 25, 1920, c. 85, sec. 17, 41 Stat. 443, as amended by Act of August 21, 1935, sec. 17, 49 Stat. 674 3

Miscellaneous:

50 C. J. 770-775, sec. 48 et seq. 11
42 Am. Jur. 215, sec. 38 11

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable the Supreme Court of the United States:

Your petitioners herein, Bert O. Peterson and Midwest Holding Company, a corporation, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above case on July 2, 1945, affirming the judgment of the District Court of the United States for the District of Columbia entered August 14, 1944.

The Proceeding Below

On July 2, 1945, the United States Court of Appeals for the District of Columbia affirmed (R. 75) with a written opinion (R. 71-74), which is not yet reported, the judgment of the District Court of the United States for the District of Columbia in this action (R. 69), which granted the respondents' motion (R. 10) as defendants for a summary judgment upon the complaint (R. 1-9) of the petitioners as plaintiffs. Within time as regularly extended a petition for rehearing (R. 75-81) was served and filed, and thereafter, or on September 10, 1945, was denied (R. 82).

By successive applications (R. 82-83) the mandate of the Court of Appeals has been stayed to December 8, 1945 (R. 83).

Jurisdiction

The jurisdiction of the Supreme Court is invoked under Section 240(a), Judicial Code of the United States, as amended (Section 347(a), Title 28, United States Code, Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938), and within the time limited by Section 350, Title 28, United States Code (Act of February 13, 1925, c. 229, sec. 8(a), 43 Stat. 940).

Under these statutes this Court has jurisdiction to review the judgment of the United States Court of Appeals for the District of Columbia rendered on July 2, 1945 (R. 75), which first became final on September 10, 1945, upon the denial of the petition for rehearing (R. 82); that is, by writ of *certiorari*, for which application is made on or before December 10, 1945.

Questions Presented

The questions presented by this record are:

1. May a motion for summary judgment be granted where the pleadings show there is a genuine issue as to a material fact?

2. Is an operator on unproven lands leased by the United States to another for the development of oil and gas, who is in possession and expressly assumes the obligations of the lease under an agreement approved and of record in the General Land Office, a "lease owner" within the intent of Section 17 of the Mineral Leasing Act of 1920, as amended by the Act of August 21, 1935, Section 226, Title 30, United States Code, Section 17, 49 Stat. 674, to whom the Secretary of the Interior must give notice of cancellation by registered mail, etc., as a condition precedent to cancellation?

The Statute Involved

The statute directly involved in this controversy is Section 17 of the Act of February 25, 1920; chap. 85, sec. 17, 41 Stat. 443, as amended by the Act of August 21, 1935, 49 Stat. 674, sec. 17; Title 30, sec. 226, United States Code, which provides:

"* * *

"Any lease issued after August 21, 1935, under the provisions of this section, except those earned as a preference right as provided in section 223 of this title, shall be subject to cancellation by the Secretary of the Interior *after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease,* unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas. *Such notice in advance of cancellation shall be sent the lease owner by registered letter directed to the lease owner's record post-office address,* and in case

such letter shall be returned as undelivered, such notice shall also be posted for a period of thirty days in the United States Land Office for the district in which the land covered by such lease is situated, or in the event that there is no district land office for such leased land, then in the post office nearest such land. Leases covering lands known to contain valuable deposits of oil or gas shall be cancelled only in the manner provided in section 188 of this title." (Italics supplied)

Statement of Facts

The petitioners' complaint for a declaratory judgment (R. 1-9) prays the reinstatement of an oil and gas lease issued by the United States to Peterson, of date December 31, 1938, for a five year term upon certain lands in Wyoming (R. 52-67). Peterson had previously held an oil and gas prospecting permit, dated November 26, 1929, issued for these lands under the Mineral Leasing Act of February 25, 1920 (R. 2). (See 41 Stat. 437, Title 30, sec. 221, United States Code.)

On August 20, 1937, while his permit was in effect Peterson entered into an operating agreement with Midwest Holding Company for the development of this acreage (R. 28-34). About April 8, 1938, this operating agreement was filed in the General Land Office, and thereupon approved (R. 2).

Under this operating agreement Midwest took the actual possession of the demised premises, entered into the occupancy of these lands to explore for oil and gas, assumed the payment of all operating costs and specifically of all rentals and royalties due the United States, and generally undertook full performance of Peterson's lease on the part of the lessee. Peterson's sole remaining rights under his lease were (1) to receive a royalty paid from production, if any, and (2) to re-enter on the default of Midwest (R. 28-34).

On September 7, 1937, Midwest made a further agreement, styled "Assignment", with Sha-Wa Petroleum Corporation (R. 35-41), filed with and approved by the Department June 16, 1938 (R. 12), but thereafter on March 7, 1941, at the suit of Midwest, cancelled by judgment of the District Court of the State for Carbon County, Montana (R. 49-51).

On March 10, 1941, a certified copy of this judgment was filed and thereupon recorded in the General Land Office (R. 5).

Thereafter on June 12, 1941, the Register of the Land Office at Cheyenne, Wyoming, sent Peterson alone notice by registered mail of an existing delinquency in the payment of rental due, advising that the lease would be recommended for cancellation unless payment was made within thirty days (R. 3). Peterson immediately wrote one John Wight, his attorney-in-fact of record in the Department and the vice-president of Midwest, demanding payment of this rental by Midwest under its operating agreement (R. 3). It is disputed whether this letter or any word at all of the proposed cancellation of the lease was ever received by the Midwest, or anyone on its part (R. 3-4).

Conversely, it is admitted that no notice under Section 17 of the Mineral Leasing Act of February 25, 1920, as amended by the Act of August 21, 1935 (41 Stat. 437; 49 Stat. 674, sec. 17; Title 30, sec. 226, United States Code), was given the Midwest or received by it (R. 4).

Nevertheless, on December 6, 1941, the Commissioner of the General Land Office wrote Peterson that his lease had been recommended for cancellation, etc. (R. 4); and on December 30, 1941, upon the predicate of the notice given Peterson alone cancellation in form of this lease followed (R. 4).

On January 26, 1943, the petitioners made formal application to the Department for the reinstatement of their lease (R. 5). The Commissioner of the General Land Office denied this application on October 23, 1943 (R. 5).

Upon appeal the Secretary of the Interior affirmed on April 3, 1944, and thereafter on May 23, 1944, denied a timely motion for rehearing (R. 5-6; 11-27).

On May 31, 1944, Peterson and Midwest filed their complaint in the district court below praying a declaratory judgment that the lease in controversy was valid for want of the statutory notice of cancellation given Midwest, and that the Secretary of the Interior be directed to reinstate this lease in his Department, etc. (R. 1-9; 8-9).

The respondents as defendants then moved, on July 1, 1944, for a summary judgment (a) because of the want of a genuine issue as to any material fact, and (b) because the complaint failed to state a cause of action (R. 10).

At the argument on the motion Walter G. Moyle, counsel for petitioners, clearly pointed out to the District Court that, *as alleged in the complaint* (R. 3-4), there was a genuine issue as to whether Midwest Holding Company had actual notice and, therefore, constructive notice under the statute; that if the Court considered this to be a material fact the motion for summary judgment must be denied; but if, on the other hand, the Court did not consider this to be a material fact, then the motion could be considered without reference to that issue. But notwithstanding this issue as to actual notice, the Court, on August 14, 1944, granted the motion, stating, in part, in a Memorandum opinion that day filed, that the motion was granted "Because there was no genuine issue as to any material fact;" and "Midwest had actual notice of the default of Peterson, and therefore, constructive notice, at least, under the statute" (R. 68). Final judgment on August 14, 1944 followed (R. 69).

At the argument on appeal, Ernest H. Oliver, counsel for appellants, likewise urged before the Appellate Court that there was a genuine issue as to whether Midwest had actual notice, and therefore constructive notice under the statute, on which no hearing had been afforded by the District Court; and also that the finding of the Secretary of the Interior in his decision of April 3, 1944 (R. 11-24, at R. 22) that Midwest Holding Company had actual notice of the impending cancellation of the Peterson lease, lacked evidence to support it. Nevertheless, the Court of Appeals affirmed the judgment of the District Court, stating, in part, in its Opinion:

> "Moreover it may properly be noted that the Secretary found that Midwest had received *actual* notice of the proposed cancellation from Peterson. (It is not argued that this finding lacks evidence to support it)" (R. 74).

The issue as to actual notice in Midwest was thereafter again brought to the attention of the Court of Appeals in appellants' Petition for Rehearing (R. 78-80) but the petition was denied (R. 82).

Specification of Errors to Be Urged

The United States Court of Appeals for the District of Columbia erred:

1. In failing to remand the case to the District Court for the submission of evidence as to whether Midwest Holding Company had actual notice, hence constructive notice under the statute, of the proposed cancellation of the lease.

2. In holding, with respect to the finding of the Secretary of the Interior as to actual notice in Midwest Holding Company of the proposed cancellation of the lease,

that "(It is not argued that this finding lacks evidence to support it)."

3. In holding and deciding that the petitioner, Midwest Holding Company, is not a "lease owner" within the intent of Section 17 of the Mineral Leasing Act of 1920, as amended by the Act of August 21, 1935 (49 Stat. 674, sec. 17; Title 30, sec. 226, United States Code), to which under the statute notice of cancellation must be given by registered mail to effect a valid, summary cancellation of the Peterson lease.

4. In failing to hold that the operating agreement between Peterson and Midwest Holding Company is an assignment.

5. In affirming the decision of the District Court.

Reasons for Granting the Writ

I

Both the District Court and the Court of Appeals considered whether Midwest Holding Company had actual notice of the proposed cancellation of the lease to be a material fact. That there is a genuine issue as to this fact and that this issue was brought to the attention of the lower courts at every opportunity, has hereinbefore been shown. Yet no opportunity has been afforded to present evidence on this question. Rule 56(c) of the Rules of Civil Procedure for the District Courts of the United States prohibits the rendition of a judgment on a motion for summary judgment when there exists a "genuine issue as to any material fact." *It follows that there has been a lack of due process of law in this case.*

II

So far as petitioners have been able to determine no Court, prior to the ruling in the instant case, has construed

what is meant by "lease owner" under the statute involved. However, the Department of the Interior admits and the Court of Appeals held that the term "lease owner" as used in the statute includes "assignees" (R. 73). The Court of Appeals, however, held in effect that the operating agreement here involved was not an assignment (R. 74). This is in conflict with the decision of the Supreme Court of Montana in *Herigstadt* v. *Hardrock Oil Co.*, 101 Mont. 22, 52 P. (2d) 171, decided in Nov. 1935. That case involved a government oil and gas prospecting permit and an operating agreement similar to the one here involved. That Court held that such an operating agreement is an assignment.

Furthermore, the words "lease owner" and "owner" have been consistently construed by the Courts to include one situated such as is Midwest Holding Company.

In *Robinson* v. *Jones*, 119 Kan. 609, 240 Pac. 957, there was drawn in question the impact of a Kansas statute imposing a tax upon oil and gas wells. Specifically, the statutory provision in issue read so far as material here (*Kans., Revised Statutes, 1923, 79-329, 330, 331*):

> "• • • Provided, that such portion of the valuation of the oil or gas wells as represents the lessor's interest, or royalty interest, therein shall be assessed to the owner thereof and the remaining portion or working interest therein shall be assessed to the *owner of the lease*, together with the other property assessed in connection therewith." (Italics supplied.)

In determining, under this statute, who were meant by the phrase "owner of the lease" the Supreme Court of Kansas held (240 Pac. 959):

> "• • • As indicated in the illustrative case, it is common for portions of these interests to be found in the hands of several persons. In the present case, one-half of the one-eighth royalty was assigned, and

each owner was assessed $12,000 on account of his one-sixteenth interest. The lessees Robinson and Shelley each retained a one-sixteenth part of the working interest. Their assignee retained a one thirty-second part, and his assignee, the operator, held eight-sixteenths. The remainder of the working interest was divided between half a dozen owners of overriding royalties. It is quite manifest that each one of the two owners of the lessor's royalty should be assessed according to his interest. The rule that words of singular number may be extended to several persons (R. S. 77-201) governs, and the words 'owner thereof,' become, in practical application of the statute, 'owners thereof.' The same is true of the working interest. The phrase 'owner of the lease,' was applied to that interest in the same sense that 'owner thereof' was applied to the lessor's interest. The phrase means owner of the working interest, and, under the rule adverted to, includes all who share in that interest. * * *"

To the same point, in varying situations, are these further decisions and texts:

Callender v. *Crossfield Oil Syndicate*, 84 Mont. 263, 275 Pac. 273 (owner of equity in oil lease covered by statute affecting "owner of any leasehold for oil and gas purposes");

Nalle v. *Eaves*, (Tex. Com. App.) 5 S. W. (2d) 500 (owner under special assessment, eminent domain and condemnation statutes embraces holders of every kind of lien, claim or equity in property involved);

Sorg v. *Crandall*, 223 Ill. 79, 84 N. E. 181 (under Illinois mechanic's lien statute an owner is anyone having an interest in the land in question);

Webber, etc., Co. v. *Erickson*, 216 Mass. 81, 102 N. E. 940 (notice to the owner of property affected requires notice to others than owner of the fee);

Dugan v. *Cedar County*, 87 Neb. 689, 128 N. W. 29 (owner of land taken for highway purposes applies to all persons having an interest);

Brigham City v. *Chase*, 30 Utah 410, 85 Pac. 436 (under eminent domain statutes an owner is anyone having any lawful interest in the property to be condemned);

Judd v. *Landin*, 211 Minn. 465, 1 N. W. (2d) 861 (sublessor is owner of real property within meaning of Minneapolis building code);

Graf v. *State*, 118 Neb. 485, 225 N.W. 466 (an owner includes anyone with an equitable right or interest in land);

Board of Commissioners v. *Northwestern Mutual Life Insurance Co.*, 114 Neb. 596, 209 N. W. 256 (real estate mortgagee is landowner under statute authorizing special assessments for drainage districts);

Woodstock, etc., Co. v. *Charleston, etc., Co.*, 84 S. C. 306, 66 S. E. 194 (landowner is any person with interest in property affected by condemnation);

Lozo v. *Sutherland*, 38 Mich. 168 (under homestead exemption statute owner includes anyone with a claim or interest in the property);

Texas, etc., Company v. *Smith*, 108 Tex. 265, 192 S. W. 533 (owner as used in statutes frequently denotes one holding in his own right but with less than absolute title);

State v. *Wheeler*, 23 Nev. 143, 44 Pac. 430;

Benjamin v. *Wilson*, 34 Minn. 517, 26 N. W. 725;

Baltimore & Ohio Rd. Co. v. *Walker*, 45 Ohio St. 577, 16 N. E. 475;

National Bond, etc., Co. v. *Anderson*, 99 Minn. 137, 108 N. W. 861;

50 C. J. 770-775, sec. 48, et seq.;

42 Am. Jur. 215, sec. 38.

III

In the western states there are literally hundreds of oil and gas leases given by the United States upon public lands which are now being explored by operators under agreements of a kind with that of the petitioner Midwest at bar. Of the demised premises the operator with the approval of the Department of the Interior, and to its knowledge, is in actual and exclusive possession.

Until an oil or gas well is actually brought in, in the vast majority of cases, these leases are not known to contain valuable deposits of either. They are, accordingly, subject to summary cancellation under the statute.

Yet to determine whether oil or gas in commercial quantities is to be found the operator, also to the knowledge of the Department, must expend large sums of money in exploration, and as at bar is commonly required by his contract to perform all the obligations of the lease on the part of the lessee. He is, in short, generally considered in the field and elsewhere the "owner" of the lease, subject only (1) to the payment by him to the lessee of a royalty if a well is brought in, and (2) to the lessee's right of re-entry for his default.

Therefore, it is of prime importance to these operators as a class under oil and gas leases presently outstanding and covering thousands of acres of public lands whether Section 17 of the Act of August 21, 1935, 49 Stat. 674, Title 30, sec. 226, United States Code, includes them as lease owners, to whom notice of cancellation prior to discovery must be sent by the Secretary of the Interior. Specifically, it is of the utmost importance in the discovery and development of oil and gas on the public lands that there be an authoritative interpretation of the controlling statute un-

der which the Secretary acts in thus summarily cancelling leases covering unproven lands. The rights of an operator or other person with a substantial interest in an existing oil and gas exploration under a lease with the United States should be neither obscure nor hereafter debatable.

Or as the Court of Appeals has put the issue (R. 73),

"The answer is not wholly without doubt, * * *"

Yet the opinion of the Court of Appeals at bar in construction of Section 17 of the Mineral Leasing Act of 1920, as amended by the Act of August 21, 1935, is *persuasive authority only* in the Circuit Courts of Appeal in the west where oil and gas lands in general lie and where the great volume of oil and gas litigation arises. That is, in these courts in the Fifth, Tenth and Ninth Circuits, for example, the instant opinion in the United States Court of Appeals for the District of Columbia is neither binding nor conclusive. There, in a proper case, the question here presented may again be raised and litigated to the unnecessary expense of the parties and to a conclusion the exact opposite of that reached by the courts of the District of Columbia, one of which has itself suggested the possibility of a different result and noted the existence of room for differing opinions.

Accordingly, it appears that the United States Court of Appeals for the District of Columbia has, in the premises, *decided a question of general importance and of substance relating to the construction and application of a statute of the United States, which has not been, but should be, settled by this Court within the intent and meaning of its Rule 38(5c).* Otherwise, inevitable dispute and confusion will follow in the construction of the applicable statute at bar hereafter as heretofore.

Conclusion

WHEREFORE, your petitioners respectfully pray that this petition be granted.

Respectfully submitted,

BERT O. PETERSON,
MIDWEST HOLDING COMPANY,
Petitioners.

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December, 1945.

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